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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO VILLA ARELLANO,

Defendant and Appellant.

2d Crim. No. B201821
(Super. Ct. No. 1191408)
(Santa Barbara County)

Francisco Villa Arellano appeals his conviction, by jury, of the first degree murder (Pen. Code, §§ 187, 189)¹ of Richard Moore. The jury also found true special circumstance and sentence enhancement allegations that appellant committed the murder for the benefit of a criminal street gang in which he was an active participant (§§ 186.22, subd. (b), 190.2, subd. (a)(22)), and that he proximately caused Moore's death by personally and intentionally discharging a firearm. (§ 12022.53, subd. (d).) The trial court sentenced appellant to a term in state prison of life without the possibility of parole, plus 25 years to life for the firearm enhancement. Appellant contends: (1) the use of pseudonyms by two witnesses deprived him of the presumption of innocence and of a fair trial; (2) the findings that the murder was premeditated and carried out for the benefit of a criminal street gang are not supported

¹ All statutory references are to the Penal Code unless otherwise stated.

by substantial evidence; and (3) the trial court erred when it failed to instruct the jury on the lesser included offense of voluntary manslaughter on a heat of passion theory and on the use of provocation to reduce the offense from first to second degree murder. We affirm.

Facts

Richard Moore, a 41-year old African American man with no gang affiliation, was shot to death in Lompoc at about 6:50 p.m. on June 18, 2005. His shooting was preceded by a violent confrontation with members of a predominantly Latino street gang known as Varrio Lampara Primero (VLP). Appellant is a member of VLP. VLP is hostile toward Black men, even non-gang members. On the afternoon of June 18, VLP members lost a fight with the Black members of a rival gang whose car broke down in VLP territory. A few hours later, Moore was murdered.

The shooting occurred near the intersection of K Street and Maple Street in Lompoc, in front of a four-unit apartment building. Appellant's mother and brothers lived in Apartment A. Appellant, who had only recently moved out of the apartment, was standing on the sidewalk in front of the building with five or six other VLP members when Moore rode by on his bicycle. Some of the VLP members started a fight with Moore. Appellant initially joined the fray, but soon ran into Apartment A to retrieve a .22 caliber revolver. Appellant wrapped the gun in a blue rag, ran or walked quickly back to Moore, and shot him twice at close range. He then ran back into Apartment A.

A passerby saw most of the attack. He told police that he watched three Latino men chase and hit a Black man who was riding a bicycle. The passerby heard three or four gun shots. He saw one of the attackers run into Apartment A. A few minutes later, a car drove up to the curb outside Apartment A. One of the attackers came outside and approached the car. The passerby was not sure if the attacker got into the car.

John Doe lived in Apartment C with his girlfriend, Jane Doe. John is severely hearing impaired while Jane Doe describes herself as completely deaf. Her

brother, Paul Pina, is a member of VLP. Jane Doe associated with the gang when she was younger. When first contacted by police on the evening of the shooting, John and Jane denied knowing anything about the crime. They later made statements to police and identified appellant as the shooter from photographic line ups. Both witnesses expressed fear of retaliation by VLP.

John Doe, who is Black, told the officers that a VLP member tried to pick a fight with him earlier on the evening of the shooting. After he walked away from the argument, John Doe saw a confrontation begin between Richard Moore and the VLP members. He tried to stop the fight but it only escalated. John Doe went inside his apartment for a moment. When he came back outside, he saw appellant walk up to Moore while holding a revolver wrapped in a blue rag. Appellant shot Moore and then ran back toward Apartment A. Moore tried to ride his bicycle away from the scene. He collapsed about one-half block away. John Doe followed him and stayed with Moore until the police and paramedics arrived.

Jane Doe told police that, at first, she watched the argument from inside her apartment. As it became more serious, she went outside and tried to calm the situation, telling Moore to leave and asking appellant not to fight with him. When she saw appellant had a gun, she told him that the police were right behind him. Appellant ignored her. He appeared to hesitate for a moment and then shot Moore at close range. By reading his lips, Jane Doe saw appellant tell another VLP member that Moore "messed with [his] home boy."

In a subsequent interview, the couple told police that Jane Doe's brother had been pressuring them and wanted to know who "ratted on his homeboy." The police spent about \$7000 helping the couple relocate to Las Vegas, to protect them from retaliation by VLP. They moved back to Santa Barbara County within a few months.

John Doe's trial testimony was generally consistent with his pre-trial statements. Jane Doe, however, repudiated her statements and her identification of appellant, testifying that she lied to police in the interviews. She testified she did not

know appellant and that he did not look like the shooter. She later contradicted herself again, testifying that she had no reason to lie to police and that her statements to them were truthful. Jane Doe's mother and sister both testified that Jane had admitted she lied to police, had not seen the shooting, and did not know who shot Moore. These witnesses claimed Jane lied because she was using methamphetamine and did not want to be arrested for being under the influence.

Other witnesses also repudiated their initial statements to police.

Manolito Fernandez, who lived in Apartment B, first told police that he smoked a cigarette with appellant between 5 and 6 p.m. on the evening of the shooting. At trial, Fernandez could no longer remember the time or date of that conversation. David Bryson, appellant's long-time friend, told police that he was with appellant at about 5:30 that evening. In a tape-recorded telephone call from jail, appellant told Bryson he must have "seen a ghost" because appellant left for Compton at about 2:30 that afternoon. Bryson testified that his first statement was wrong and that the conversation he described had occurred three or four days earlier, not on the day of the shooting. In other taped conversations from jail, appellant asked Bryson and another VLP member about a girl who "can't hear." He told them to talk with his girlfriend and with Jane Doe's brother about what they knew.

Appellant relied on an alibi defense at trial. His large extended family lives in Compton, a nearly three hour drive from Lompoc. On the evening of the shooting, a cousin hosted a large party at her house in Compton. When police reached appellant by cell phone a few days later, appellant said that he was in Compton and had been at the party when the shooting occurred. Appellant claimed that he arrived in Compton at about 6:00 p.m. on the night of the shooting. He saw his mother and younger brother at the party but did not speak with them.

Appellant's mother and brother told police they did not see appellant at the party. Both later said that other guests, who they could not name, told them that appellant was at the party. Many other party guests said they saw appellant at the party. These statements were made to police after appellant's conversation with the

investigating officer.² Although many guests had still and video cameras with them, there were no pictures of appellant at the party.

Discussion

Witnesses' Use of Pseudonyms

Appellant contends the trial court's order permitting John Doe and Jane Doe to testify under pseudonyms, without evidence of actual or threatened retaliation against them, deprived him of his federal constitutional rights to the presumption of innocence and a fundamentally fair trial. The pseudonyms, appellant argues, implied the witnesses' testimony was truthful and that appellant was dangerous. Respondent contends the point has been waived and that the trial court did not abuse its discretion because appellant had all of the information needed to cross examine the witnesses. We conclude the issue was preserved for review and that the trial court did not err.

Before the preliminary hearing, appellant objected that the use of pseudonyms would violate his due process, confrontation and cross examination rights. The objections were overruled. Prior to jury selection, appellant objected that the pseudonyms prejudicially implied, without any factual basis, that he was dangerous. Appellant did not specify any federal constitutional grounds for this objection. It was again overruled. Appellant later moved for a new trial, contending the pseudonyms deprived him of due process and a fair trial, again without reference to the federal constitution.

These objections were sufficient to avoid waiving the issue. As our Supreme Court explained in *People v. Partida* (2005) 37 Cal.4th 428, a trial objection must fairly state specific reasons for excluding evidence. If the objection is overruled, the defendant may raise the same arguments on appeal but may not argue the evidence should have been excluded for a reason not asserted at trial. (*Id.* at p. 431.) "A defendant may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process." (*Id.*) An objection must be

² One guest testified that the hostess asked her to do their family a favor by "remembering" that appellant was at the party.

specific enough that "the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*Id.* at p. 435.) At the same time, however, "no purpose is served by formalistically requiring the party also to state every possible legal consequence of error merely to preserve a claim on appeal" (*Id.* at p. 437.) If the trial court was asked to consider the same facts and apply a legal standard similar to the one we will use to decide the issue on appeal, the claim has been preserved. (*Id.* at p. 436.)

Appellant's arguments here rely on the same facts presented to the trial court. His claim here, as below, is that the use of pseudonyms was unfairly prejudicial because it implied that the witnesses were truthful and that he is dangerous. Although his claim is now couched in federal constitutional terms not expressly referenced below, no useful purpose would be served by declining to consider it. (*Id.* at pp. 436-437; see also *People v. Rogers* (2006) 39 Cal.4th 826, 850 fn. 7; *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Regardless of whether the issue has been waived, the trial court did not err. The decision to use pseudonyms did not unfairly prejudice appellant, impair his ability to investigate the witnesses' backgrounds and credibility, or limit his cross-examination of them. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1136.)

The Sixth and Fourteenth Amendments to the federal Constitution guarantee the defendant in a criminal case the right "physically to face those who testify against him, and the right to conduct cross-examination." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 51.) They do not, however, mandate pretrial disclosure of all information related to a witness' identity and credibility. Normally, confrontation rights are "satisfied if defense counsel receives wide latitude at trial to question witnesses." (*Id.* at p. 53.)

In *Smith v. Illinois* (1968) 390 U.S. 129, the Court held these principles were violated by evidentiary rulings that denied defense counsel "the right to ask the principal prosecution witness either his name or where he lived [W]hen the credibility of a witness is in issue, the very starting point in 'exposing falsehood and

bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." (*Id.* at p. 131, fn. omitted.)

More recently, our Supreme Court acknowledged in *Alvarado v. Superior Court, supra*, 12 Cal.4th 1121, that a trial court may exercise its discretion to deny, restrict, or delay pretrial disclosure of a witness' identity for good cause, including threats or other danger to the witness. (*Id.* at p. 1134; § 1054.7.) Witness identities may not, however, be withheld during trial because to do so would significantly impair the defendant's ability to investigate and cross-examine the witnesses. (*Alvarado, supra*, 23 Cal.4th at pp. 1151-1152.) The state's legitimate interest in protecting witnesses "cannot justify depriving the defendant of a fair trial. Thus, when nondisclosure of the identity of a crucial witness will preclude effective investigation and cross-examination of that witness, the confrontation clause does not permit the prosecution to rely upon the testimony of that witness at trial while refusing to disclose his or her identity." (*Id.* at p. 1151.)

Here, the trial court did not abuse its discretion when it permitted John and Jane Doe to use pseudonyms. Appellant and his counsel knew the witnesses' true names and obtained discovery relating to their prior criminal records, gang associations, prior statements to police, the relocation assistance they received and their move back to Santa Barbara County. Counsel used this information to conduct a thorough and effective cross-examination of each witness. Defense counsel was therefore able to " 'place [each] witness in his [or her] proper setting and put the weight of his [or her] testimony and his [or her] credibility to a test . . . ' " (*Smith v. Illinois, supra*, 390 U.S. at p. 132.)

Appellant contends he was prejudiced because the pseudonyms implied he is dangerous. We are not persuaded. The jury received pretrial instructions that explained the pseudonyms were used "only to protect [the witnesses'] privacy as

required by law. [¶] The fact that the person is identified this way is not evidence. Do not consider it for any purpose." We presume the jurors understood and followed this instruction. (*People v. Osband* (1996) 13 Cal.4th 622, 714.)

There was also an evidentiary basis for the pseudonyms. Both witnesses told police they were afraid of retaliation by VLP. Jane Doe's brother asked her who "ratted" on appellant. She was referred to in a telephone conversation between appellant and other VLP members. The prosecution's gang expert testified that VLP retaliated violently against informers. Thus, the witnesses reasonably feared retaliation by VLP members who would have an interest in discouraging them from cooperating with law enforcement, regardless of whether appellant approved of or participated in the retaliation. The trial court could also reasonably have concluded that keeping the witness' names out of the local media's trial coverage would limit access to that information. There was no error.

Substantial Evidence

Appellant contends there is no substantial evidence that the shooting was premeditated and deliberate, nor is there substantial evidence to support the gang allegations and special circumstance. We disagree.

Premeditation and Deliberation: As the trial court correctly instructed the jury, a murder is premeditated and deliberated if the killer "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill[.]" and if he "decided to kill before committing the act that caused death." (CALCRIM No. 521.) In determining whether the evidence is sufficient, we "review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt." (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) We do not, however, substitute our judgment for that of the jury. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Where the jury has relied on inferences to reach its verdict, "those inference must be reasonable. An inference is

not reasonable if it is based only on speculation." (*People v. Holt* (1997) 15 Cal.4th 619, 669.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 27, our Supreme Court held that findings of premeditation and deliberation will generally be considered to have been supported by substantial evidence where the evidence shows planning activity, motive and a manner of killing that suggests the killing occurred on reflection rather than on rash impulse. (See, e.g., *People v. Pride* (1992) 3 Cal.4th 195, 247.) These general categories are intended to guide our assessment of the evidence; the list is not exhaustive nor does it purport to restate the elements of first degree murder. (*People v. Perez, supra*, 2 Cal.4th at 1125.)

The record here discloses substantial evidence to support findings of premeditation and deliberation. Viewed in the light most favorable to the judgment, the evidence shows that appellant and his fellow VLP members acted together to confront the unarmed victim. They started the fight, chasing, yelling at and hitting the victim. After a short time, appellant left the fight, ran to his mother's apartment and retrieved a gun. He quickly returned to shoot the victim at close range. Jane Doe testified that appellant appeared to hesitate before firing the gun.

Planning activity is demonstrated by the coordinated nature of the assault on Moore, and by appellant's conduct in leaving to retrieve his gun and then returning to shoot Moore. Evidence of motive was supplied by the expert's testimony that VLP uses violence to control its "territory," and that VLP members were frequently violent with Black men. Additionally, appellant's own statement that Moore "messed with [his] home boy[]" was relevant to motive. The manner of killing also supports an inference of premeditation and deliberation. While appellant was retrieving his gun and returning to the victim, he had time to consider whether to fire the weapon. His callous decision to do so is substantial evidence that he acted with premeditation and deliberation.

Special Circumstance and Sentence Enhancement Allegations.

Appellant contends the jury's finding that he carried out the murder for the benefit of a

criminal street gang is supported only by "raw speculation," and not by substantial evidence. (§ 186.22, subd. (b)(1).) We disagree because there was evidence from which the jury could infer that appellant intended to benefit VLP by shooting Moore.

As appellant notes, several cases have held that an expert's opinion, standing alone, is insufficient to prove a defendant's specific intent to benefit a gang. For example, in *In re Frank S.* (2006) 141 Cal.App.4th 1192, an expert opined that a gang member could use a knife as a weapon in a fight with other gangs. This opinion was insufficient to prove that a minor possessed a knife for the benefit of his gang because there was no evidence that the minor "was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense." (*Id.* at p. 1199.) Similarly, in *People v. Killebrew* (2002) 103 Cal.App.4th 644, the defendant was convicted of conspiring with other gang members to possess a gun. Three members of appellant's gang were in the car when the gun was found, but the defendant was not among them and no evidence linked him to either the car or the gun. An expert's opinion that, " 'when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun[,] ' " was not, according to the Court of Appeal, sufficient to establish the defendant's intent to possess the gun for the benefit of the gang. (*Id.*, at p. 652.) In *People v. Ferraez* (2003) 112 Cal.App.4th 925, by contrast, substantial evidence supported a finding that the defendant intended to benefit a gang by possessing drugs for sale. An expert explained the benefits that gangs derive from selling drugs and there was evidence that the defendant had admitted his gang membership to police and told them he had permission from a gang to sell drugs in its territory.

Here, the gang expert testified that, in his opinion, members of VLP commit violent crimes for the benefit of VLP because violence intimidates neighborhood residents and solidifies the gang's control over its territory. This opinion testimony was not the only evidence from which appellant's specific intent to benefit VLP could be inferred. The shooting occurred in a VLP neighborhood. VLP had a history of violent confrontations with Black men, including a 2004 assault on appellant

by two Black men. Earlier on the day of the shooting, VLP members lost a fight with three Black men. Moments before Moore approached the apartment building, VLP members tried to start a fight with John Doe, another Black man. Appellant joined with other VLP members in the initial assault on Moore and he later told another VLP member that Moore, "messed with my home boy." Appellant was, therefore, in VLP territory, surrounded by VLP members, shooting a man VLP identified as its enemy. This is substantial evidence supporting a reasonable inference that appellant specifically intended to commit the murder for the benefit of a criminal street gang.

Instructional Error and Ineffective Assistance of Counsel

Appellant contends the trial court erred when it failed to instruct sua sponte on voluntary manslaughter. He further contends his trial counsel was ineffective for failing to request a jury instruction that provocation may reduce the offense from first to second degree murder.

Instructions on Voluntary Manslaughter.

The trial court has a duty to instruct on lesser included offenses, even in the absence of a request, where substantial evidence would permit a reasonable jury to find that the defendant had committed only the lesser offense, and not the offense charged. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Voluntary manslaughter is a lesser included offense of first degree murder. As relevant here, "the offense is defined as the unlawful killing of a human being without malice aforethought 'upon a sudden quarrel or heat of passion.' (§ 192, subd. (a).)" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) "The defendant must actually, subjectively kill under the heat of passion." (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) In addition, the heat of passion must occur on provocation by the victim, under circumstances that would be adequate to cause an ordinarily reasonable person to " 'act rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " (*People v. Wickersham* (1982) 32 Cal.3d 307, 326, disapproved on other grounds, *People v. Barton* (1982) 12 Cal.4th 186, 200-201;

see also *People v. Cole*, *supra*, 35 Cal.4th at pp. 1217-1218; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411-1412.)

Here, there is no evidence Moore had a "sudden quarrel" with appellant, that he said or did anything sufficient to provoke an ordinary reasonable person to deadly violence, or that appellant subjectively experienced a heat of passion that prevented him from forming a deliberate intent to kill. The only evidence is that Moore was assaulted by a group of gang members, one of whom left to retrieve a gun and returned to shoot him. Nothing in this scenario supports a jury instruction on voluntary manslaughter. The trial court did not err.

Ineffective Assistance of Counsel.

Where the defendant forms the intent to kill in direct response to provocation and then immediately acts on that intent, the offense may be reduced from first to second degree murder. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 329.) The provocation at issue in this context is subjective, not objective. It need only be sufficient to prevent the defendant from premeditating or deliberating. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677-678.)

Appellant contends his trial counsel was ineffective for failing to request an instruction on the mitigating effect of provocation. To prevail on this claim, appellant must show both that counsel's conduct fell below prevailing professional norms and that he was prejudiced because the result at trial would have been more favorable to him but for counsel's deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) A prejudicial failure to request appropriate jury instructions may constitute ineffective assistance of counsel, trial counsel has no obligation to request instructions that are not supported by the evidence. (*People v. Price* (1991) 1 Cal.4th 324, 387; *People v. Szadziwicz* (2008) 161 Cal.App.4th 823, 836.)

As we have already noted, there was no evidence that appellant subjectively experienced provocation sufficient to reduce the offense to second degree murder. To the contrary, the evidence showed that he had, and took, the opportunity to consider his actions before he fired the fatal shots. We note, in addition, that

appellant relied on an alibi defense at trial. An argument that he was provoked into shooting Moore would, of course, have directly contradicted this defense theory. Under these circumstances, appellant's trial counsel was not ineffective for failing to request an instruction on second degree murder.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

James E. Herman, Judge
Superior Court County of Santa Barbara

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